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In The
Supreme Court of the United States

WASHINGTON STATE GRANGE,
TERRY HUNT and JANE HODDE,

Petitioners,

v.

WASHINGTON STATE DEMOCRATIC PARTY, et al.,
REPUBLICAN STATE COMMITTEE OF WASHINGTON,
et al., LIBERTARIAN PARTY OF WASHINGTON STATE,
et al., SAM S. REED, as SECRETARY OF STATE of the
STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONSE BRIEF OF REPUBLICAN STATE COMMITTEE OF WASHINGTON

JOHN J. WHITE, JR.
Counsel of Record

KEVIN B. HANSEN
LIVENGOOD, FITZGERALD &
ALSKOG, PLLC
620 Kirkland Way, Suite 200
Kirkland, WA 98083-0908
(425) 822-9281

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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STATEMENT

It is beyond principled debate that Washington's blanket primary forces the Republican Party to have its nominees chosen by voters who are not Republicans. In response to the decision striking down the blanket primary, *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), the Washington Secretary of State asked the legislature to replace the existing blanket primary with a "modified blanket primary." Wash. S.B. 6453 Rep. (App. at 1a). The Secretary and Washington's legislature understand that the blanket primary forces the Republican Party to have non-members select its standard bearer, as is made clear in the bill report:

> The method used in Washington to nominate candidates for the general election ballot is called the "blanket primary." *This primary allows the votes of voters who are not members of a major political party to be counted in determining what candidate will run in the general election as the major party's candidate or standard bearer.*

Id. (emphasis added). In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court held that the blanket primary's forced association of opening up the political parties' candidate-selection process to "persons wholly unaffiliated with the party" has the "likely outcome . . . of changing the parties' message" – "We can think of no heavier burden on a political party's associational freedom." *Id.* at 581-582.

REASONS FOR DENYING THE PETITION

1. Underlying the Grange Petition Are the Same Meritless Arguments Advanced by the State of Washington in its Petition for Writ of Certiorari.

The Grange asserts three independent bases for this Court to review the *Reed* decision, claiming that (1) the Republican Party's right to challenge Washington's blanket primary after *Jones* is barred by two earlier state court judgments, (2) the Ninth Circuit has created an intra-circuit conflict in its *Reed* decision and a subsequent decision regarding Arizona's semiclosed primary election system, and (3) the *Reed* decision raises crucial questions regarding permissible systems of primary elections that require this Court's guidance. None withstand cursory scrutiny.

Underpinning these grounds are the allegedly compelling state interests of increasing participation in the primaries, "maximizing" voter choice, and secrecy of party affiliation. These principles, along with the assertion that there is no harm in having Republican nominees chosen by non-members and members of other parties, appear in various formulations throughout the petition, *see, e.g.*, Grange Pet. at 4, 12, 14, 21-22, and mirror those raised in the petition of Washington's Secretary of State. These assertions are addressed in detail in the Republican Party's response to the Secretary's petition.

Neither the Grange nor the State can escape the conclusion that Washington's blanket primary has changed, and would continue to change, the messages of parties and candidates.

2. The Grange Failed, at Both the District Court and the Ninth Circuit, to Establish Either the Factual or Legal Prerequisites to Invoke *Res Judicata* to Bar the Republican Party's First Amendment Right to Free Association.

The district court, the Ninth Circuit, and even its co-party, Secretary of State Reed, reject the notion that *res judicata* barred resolution of important First Amendment rights. *See* ER 0466-0468; *Reed*, 343 F.3d at 1202; Reed Petition at 19, n.17. The Grange ignores this Court's longstanding recognition that the doctrines of preclusion do not apply if a party has not had its claim presented or if there has been a significant change in the law. *See Montana v. United States*, 440 U.S. 147, 155 (1979). The Washington Republican Party was not before the court in either *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936) or *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980). To the extent that either would apply, the two decisions are in direct conflict with *Jones*, which constitutes a significant change in the law.

Heavey was decided before this Court's long line of cases upholding the right of political parties to determine whether non-members may participate in the selection of party nominees for public office. *See, e.g., Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Jones*, 530 U.S. at 575 ("Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'") (quoting *Eu*, 489 U.S. at

224). There is no reason to assume that the Supreme Court of Washington would continue to adhere to *Heavey* in light of later First Amendment developments.

The burden was on the Grange to establish both the factual and legal underpinnings to show that *res judicata* would apply.[1] Even had the Grange met this burden, powerful public policy reasons are present that would override its application. *See Kennedy v. City of Seattle*, 94 Wn.2d 376, 378-79, 617 P.2d 713 (1980) (holding that important public questions of law should not be barred by collateral estoppel). If *res judicata* applied, the country would have a two-tier right of association for political parties, with the political parties in Washington State being burdened with a primary election system that would violate the First Amendment in every other state.

The Grange also contends that the Ninth Circuit's *Reed* decision "threatens" this Court's decision in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). The "threat" is nonexistent, as shown in the Republican Party's response to

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[1] In Washington state, *res judicata* bars a second action only if it "has a concurrence of identity with a prior judgment." *Snyder v. Munro*, 106 Wn.2d 380, 383, 721 P.2d 962 (1986) (internal quotation marks omitted). "The areas of concurrence are the following: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *Id.* In *Snyder*, the prior action included the Republican State Committee of Washington, the Democratic State Committee of Washington, and the Democratic State Central Committee. The plaintiffs in the second action identified themselves as registered voters and members of a political party harmed by legislative redistricting, and the court held that the plaintiffs' interests were represented in the prior judgment. Unlike *Snyder*, the Republican Party's interests were not represented in either *Heavey* or *Anderson*.

the State's petition. *See* Response Brief of Republican State Committee at 17-18. The Grange's dire prediction that minor parties and independents cannot survive without the blanket primary has no factual basis in the record and ignores the experience of minor parties and independents in every other state.

3. There Is No Intra-Circuit Conflict Between *Reed* and *Bayless*. Even If There Were, That Is Not a Basis For Supreme Court Review.

The Grange fabricates a conflict between *Reed* and *Arizona Libertarian Party v. Bayless*, No. 02-16535, 2003 U.S. App. LEXIS 24626 (9th Cir. Dec. 8, 2003). Unlike *Reed*, *Bayless* involved the constitutionality of a semi-closed primary, a primary election system that this Court declined to rule upon in *Jones*, stating that such a system *may* be "constitutionally distinct" from the blanket primary. *Jones*, 530 U.S. at 577, n.8. In both cases, however, the Ninth Circuit used the same constitutional analysis (determining the severity of the burden imposed by the primary system and whether the burden is justified) used by this Court in *Jones*. *Compare Bayless*, 2003 U.S. App. LEXIS at *5-*6, and *Reed*, 343 F.3d at 1204-1206, *with Jones*, 530 U.S. at 581-585.

In *Bayless*, the Ninth Circuit relied upon this Court's analysis in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) to hold that allowing non-members to vote for party leaders in Arizona imposes a severe burden on the party. Likewise, the Ninth Circuit's

Reed decision relied upon this Court's analysis in *Jones*[2] to conclude that Washington's blanket primary imposes a severe burden on the Republican Party's rights of association.

The Grange grossly mischaracterizes *Reed* as "automatically invalidat[ing] all States' primaries which allow nonmember or unaffiliated voters to participate." Grange Petition at 18. The Ninth Circuit did not hold that Washington's blanket primary was *per se* unconstitutional. Instead, the court determined that Washington's blanket primary imposes a severe burden on the Republican Party's associational rights. Weighing this burden against the state's purported compelling interests, the court applied the same balancing test used in *Jones* and *Bayless*: "[U]nder *Jones* the Washington blanket primary . . . is unconstitutional unless the defendants bear their burden of demonstrating that 'it is narrowly tailored to serve a compelling state interest.'" *Reed*, 343 F.3d at 1204 (quoting *Jones*, 530 U.S. at 582).

4. The Grange's State Constitutional Arguments Have Been Rejected by Washington's Supreme Court.

The Grange wrongly asserts that the state constitutional rights to "vote at all elections," WA. CONST. art. VI, § 1, and to "absolute secrecy," WA. CONST. art. VI, § 6,

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[2] As pointed out in the Republican Party's response to the State of Washington's petition for writ of certiorari, the evidence of the practical impact of the blanket primary on which this Court relied in *Jones* was Washington State's experience under its blanket primary. *See* Response Brief of Republican State Committee at 10-12.

trump the Republican Party's right to exclude non-affiliated and rival-party voters from its candidate selection process. In 1908, shortly after Washington's first primary law was enacted, the State Supreme Court directly addressed the question of whether a "primary" is an "election" under Washington's constitution. The court squarely ruled that a "primary" was not an "election" under the state constitution:

> Section 12 of the primary act provides that, when a voter at the primary election demands the ticket of a particular party, and his right to vote that ticket is challenged, he shall make oath or affirmation that he intends to affiliate with the party whose ballot he demands at the ensuing election, and that he intends to support generally the candidates of that party. It is contended that this section adds a requirement to the qualifications of electors in addition to the constitutional requirements, and for that reason renders the entire act void. Were the primary election so far such an essential part of the general election as to make the constitutional provision relating to the qualification of electors entitled to vote at the general election applicable thereto, then there would be force in this objection. *But we do not think the sections of the Constitution providing the qualifications of electors applicable to the primary election provided for by this statute. It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office, to be voted for at the general election. Being so, the qualifications of electors, provided by the Constitution for the general election, can have no application thereto.*

State ex rel. Zent v. Nichols, 50 Wash. 508, 522, 97 P. 728 (1908) (emphasis added). A partisan primary with a public declaration does not violate Washington's Constitution. The Grange fails to distinguish, cite, or in any way acknowledge this express interpretation of the State Constitution. Its argument is contrary to established law.[3]

The Grange, curiously, quotes language from *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Wesberry v. Sanders*, 376 U.S. 1 (1964). Neither case supports the Grange claim that allowing parties to limit participation in partisan primaries threatens "fundamental . . . voting rights." Grange Petition at 21. *Reynolds* and *Wesberry* involved the invalidation of reapportionment legislation in Alabama and Georgia, respectively. The cases did not address the states' primary election systems, although both Alabama and Georgia used (and continue to use) a closed primary election to determine which candidates would qualify for the state's general election. *See* ALA. CODE § 17-16-1; *Ex parte Skidmore*, 277 Ala. 221, 168 So. 2d 483 (1964); GA. CODE ANN. § 21-2-151; *cf. Ray v. Blair*, 343 U.S. 214 (1952) (upholding a party's right to require the party's primary election candidates to pledge support to the party's presidential nominees). If the Grange is correct that limiting a voter to a single nominating act restrains the right to vote, a blanket primary would not only be constitutionally permitted, it would be mandatory throughout the nation.

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[3] In *Heavey v. Chapman*, relied upon by the Grange, *see* Grange Petition at 13-14, the State Supreme Court stated that "[i]t may be the blanket primary has defects and shou!d be corrected, amended, or even repealed." *Heavey*, 93 Wn.2d at 705. *Heavey* confirms that even under Washington's constitution the blanket primary is not mandatory.

The primaries of every other state would be unconstitutional because they restrict "[t]he right to vote freely for the candidate of one's choice." *Reynolds*, 377 U.S. at 555.

5. This Court Does Not Need to Issue an Advisory Opinion About the Constitutionality of Primary Election Systems that Are Not Before the Court.

The Grange's claim that *Reed* "will invalidate over 21 States' open primaries" is false. No state other than Washington was a party to this case, and only Washington's primary was ruled unconstitutional. The Ninth Circuit did not address the constitutionality of open primaries in *Reed* any more than this Court did in *Jones*. *See Jones*, 530 U.S. at 577, n.8 ("This case does not require us to determine the constitutionality of open primaries."). Ignoring the "case or controversy" requirement for federal jurisdiction, *see* U.S. CONST. art. III, § 2, cl. 1, the Grange improperly requests an advisory opinion from the Court regarding the impact of *Jones* and *Reed* on other types of primaries.

As stated in the Republican Party's response to the State of Washington's petition, this Court provided clear guidance on the constitutionality of the blanket primary in *Jones*. *See* Response Brief of Republican State Committee at 18-19.

CONCLUSION

The Grange has advanced no arguments that would justify further review of the blanket primary by this Court. As this Court determined in *Jones*, forcing "political party to associate with – to have their nominees, and

hence their positions, determined by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival" imposes a severe burden that is not justified by state interests identical to those put forward by the Grange. *Jones*, 530 U.S. at 577, 582-585. The Republican Party requests that the Court deny the petition.

Respectfully submitted this 9th day of February, 2004.

JOHN J. WHITE, JR.
Counsel of Record

KEVIN B. HANSEN
LIVENGOOD, FITZGERALD & ALSKOG
620 Kirkland Way, Suite 200
P.O. Box 908
Kirkland, WA 98083-0908
425-822-9281

APPENDIX 1

SENATE BILL REPORT

SB 6453

As Reported By Senate Committee On:
Government Operations & Elections, February 3, 2004

Title: An act relating to the modified blanket primary.

Brief Description: Enacting a modified blanket primary.

Sponsors: Senators Roach, Hargrove, Hale, T. Sheldon, Schmidt, Winsley, McCaslin, Carlson and Fairley; by request of Secretary of State.

Brief History:
Committee Activity: Government Operations & Elections: 1/21/04, 2/3/04 [DPS, DNP].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 6453 be substituted therefor, and the substitute bill do pass.

Signed by Senators Roach, Chair; Stevens, Vice Chair; Berkey, Fairley and McCaslin.

Minority Report: Do not pass.
Signed by Senator Horn.

Staff: Diane Smith (786-7410)

Background: The method used in Washington to nominate candidates for the general election ballot is called the "blanket primary." This primary allows the votes of voters who are not members of a major political party to be counted in determining what candidate will run in the general election as the major political

party's candidate or standard bearer. This feature of the Washington blanket primary was held unconstitutional by the federal Court of Appeals because, in the court's opinion, the major political parties' First Amendment right of free association was violated. The Secretary of State has petitioned the United States Supreme Court to review the lower federal court's decision. The Supreme Court has said that it will issue its decision on this petition on February 23, 2004.

Summary of Substitute Bill: A primary may not be used to select the nominees of a political party. The purpose of the primary is to certify two candidates for any partisan office as qualified to appear on the general election ballot.

Primary candidates are qualified when they receive either the most or second most votes cast for each office appearing on the primary ballot. All voters are permitted to vote for the candidate they prefer for each office.

The existing election statutes are amended to implement these principles.

The title of the bill is "an act relating to a qualifying primary." The petition requirement for candidates for partisan office in existing law is removed. There are no contingent effective dates.

Substitute Bill Compared to Original Bill: The title of the original bill was "an act relating to a modified blanket primary." The original bill made no changes to existing petition requirements for candidates for partisan office. The original bill's effective date was contingent upon possible judicial outcomes from pending federal court appeals.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Testimony For: We may not even need a replacement primary. Why fix what is not broken? Should the parties or the people have substantial control over the primary process? A qualifying primary does not select the parties' standard bearer. The people of Washington feel that their party affiliation, if any, is a private matter. This bill is modeled after our current nonpartisan primary, allowing the candidate, if he or she desires, to add a party designation.

Testimony Against: The blanket primary did not give the parties enough flexibility. If the parties do not get the primary they want, they will go back to party conventions. This will practically ensure that the average voter has no say in the decision for the party's standard bearer. Since so few people vote anyway, legislation that appears to limit people's choices is not a positive step. Voters want more than two choices on the general election ballot.

Testified: Andrew Pierce, WA Coalition For IRV; Jody Grage Haug, Green Party of WA State; Sam Reed, Secretary of State; Chris Vance, WSRP (con); Jim Pharris, Attorney General's Office;